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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/726,032	11/30/2000	Jeffrey Kent Fredenburgh	03266.000100	9978
5514	7590	07/07/2005	EXAMINER	
FITZPATRICK CELLA HARPER & SCINTO 30 ROCKEFELLER PLAZA NEW YORK, NY 10112			WARE, DEBORAH K	
			ART UNIT	PAPER NUMBER
			1651	
DATE MAILED: 07/07/2005				

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

09/726,032

Applicant(s)

JEFFREY KENT FREDENBURGH  
ET AL

Examiner

Deborah K. Ware

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 14 April 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 33-45 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 33-45 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date 11/19/04.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

### **DETAILED ACTION**

Claims 33-45 are presented for examination on the merits.

#### ***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on September 27, 2004 has been entered.

#### ***Election/Restrictions***

Applicant's election of Group II in the reply filed on April 14, 2005 is acknowledged. Because applicant did not distinctly and specifically point out the supposed errors in the restriction requirement, the election has been treated as an election without traverse (MPEP § 818.03(a)). All non-elected claims have been canceled.

#### ***Priority***

Receipt is acknowledged of papers submitted under 35 U.S.C. 119(a)-(d), which papers have been placed of record in the file.

#### ***Information Disclosure Statement***

The information disclosure statement (IDS) submitted on November 19, 2004 was received. The submission is in compliance with the provisions of 37 CFR 1.97. Accordingly, the information disclosure statement is being considered by the examiner.

***Papers***

The Power Attorney has also been received and is acknowledged by the examiner. The Preliminary Amendment(s) have been received and entered.

***Response to Amendment***

Applicant's arguments filed July 19, 2004, have been fully considered but they are not persuasive for reasons which are as follows and set forth below. However, the rejection under 35 USC 112, first and second paragraphs have been removed. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

***Claim Rejections - 35 USC § 103***

Claims 33-45 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lin et al. in view of WO 97/43385, Horney et al. , Blyth et al and Vinod, all cited of record, in the previous Office Action of March 27, 2003.

Claims are drawn to a composition for controlling odor associated with deposits of organic material which can cause odors, the composition comprising comprising dormant spore forming bacteria and adhering agent(s). The adhering agent can be stain-blocking chemicals or fluorochemicals. Further, the composition optionally includes sodium bicarbonate or molecular sieves.

Also the stain-blocking agents can be varied sulfonated polymers (see claims 9 and 18).

Lin et al teach protected spore formers as the desired bacteria of which are of the genus *Bacillus* (B.) and include species *B. laevolacticus*, *B. pasteurii* and *B.*

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amyloliquefaciens. Note col. 3, lines 19-21 and col. 4, lines 40-65. Further, the cell counts are within  $10^6$  to  $10^8$  range, note col.s 5-6, lines 35-40.

WO Patent, cited above, teach a composition for controlling odor for soft surfaces and hard surfaces using microbial enzymes and sulfonated surfactants, anti-soil agents (pages 32-33, all lines), sodium carbonate (page 56, line 20), bicarbonates (page 30, line 33), condensation polymers (page 12, lines 20-35).

Horney et al teach method and composition for controlling odor for soft surfaces using Bacillus bacterial agent and other additives as necessary. Bacillus megaterium is specifically disclosed. Note col. 2, lines 30-50 and see the abstract. Also note col. 3-4, all lines.

Each of Blyth et al. and Vinod teach method and composition for controlling stains on soft surfaces comprising applying stain blockers and fluorochemicals. Specifically note Vinod, at col. 6, lines 45-65; and note abstracts of both references.

It would have been obvious to one of ordinary skill in the art at the time the claimed invention was filed to combine the disclosure of Lin, WO Patent, Horney, Blyth and Vinod in order to provide for a composition for controlling odor. Each of Lin, WO Patent and Horney teach deodorizing using bacterial agents and their products (i.e. dormant spores, enzymes, etc.).

To select for dormant bacteria to control and provide for a composition for odor control is clearly taught. To combine the dormant bacteria with adhering agents is also disclosed wherein surfactants will adhere organic deposits and thus, function as an adhering agent. Other adhering agents and/or trapping agents or neutralizing agents

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such as bicarbonate (i.e. sodium bicarbonate), are disclosed. Specifically stain-blockers and fluorochemicals are well known in the art to be useful for treating soft surfaces and to add them to dormant bacteria is clearly within the purview of an ordinary artisan.

Horney clearly teaches additives to dormant bacteria is well known. The bacterial counts useful are disclosed. The specific adhering agents are disclosed. To combine the two is clearly an obvious modification of the cited prior art. Thus the claims are prima facie obvious over the cited prior art.

### ***Response to Arguments***

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, each of the ingredients of the claimed composition are well recognized by the cited prior art to be useful and to be comprised by odor controlling compositions. Thus, there is some teaching, or at least suggestion, to provide the claimed invention having these ingredients. Further, the arguments directed to a method for controlling are moot since the claims no longer require any method.

Also any argument directed to use upon any surface is not persuasive because the composition's intended use is not give any patentable weight per se. In response to

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applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning or a reconstruction, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

All claims fail to be patentably distinguishable over the state of the art discussed above and cited of record. Therefore, the claims are properly rejected.

The remaining references listed on the enclosed PTO-892 Form and/or PTO-1449 are cited to further show the state of the art.

No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Deborah K. Ware whose telephone number is 571-272-0924. The examiner can normally be reached on 9:30-6:00.


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mike Wityshyn can be reached on 571-272-0926. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Deborah K. Ware  
June 25, 2005



DAVID M. NAFF  
PRIMARY EXAMINER  
ART UNIT 1651